

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

DAMON L. STEPHENS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Criminal Case Number 06-cr-20365
Civil Case Number 11-cv-14377
Honorable Thomas L. Ludington

Respondent.

ORDER DENYING PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT

On January 15, 2012 Magistrate Judge Charles issued a Report and Recommendation, recommending that Petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence be denied. ECF No. 82. Judge Binder concluded that Petitioner's ineffective assistance of counsel claims are procedurally barred because the appellate court already addressed the issues underlying the claims. In particular, the appellate court found that the evidentiary errors Petitioner alleged were harmless and, as a result, any claims that an attorney was ineffective for failing to raise these same errors are also procedurally barred. Alternatively, Judge Binder concluded that even if the claims were not procedurally barred, any failure on the part of counsel for not preventing the alleged errors that the Sixth Circuit concluded were harmless could not have prejudiced Petitioner as required under *Strickland v. Washington*, 466 U.S. 668 (1984). Finally Judge Binder concluded that an evidentiary hearing on Petitioner's motion was unnecessary because that was no material factual dispute that a hearing could address and "the files and the records of the case conclusively show[ed] that [Petitioner] is entitled to no relief." 28 U.S.C. § 2255(b).

On January 23, 2012, Petitioner requested an extension of time to file objections to the report and recommendation, which was granted. ECF No. 84. Plaintiff was given a thirty-day extension,

for a total of forty-four days, to file his objection to the report and recommendation. Because service of the report and recommendation was made by first class mail sent to Petitioner's address under Federal Rule of Civil Procedure 5(b)(2)(C), three days are added after the period would otherwise expire under Federal Rule of Civil Procedure 6(d). As a result, Petitioner's objections were due on or before February 21, 2012. No objections were filed, and the Court subsequently adopted Judge Binder's report and recommendation on February 24, 2012. ECF No. 85.

On March 15, 2012, Petitioner filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e). Petitioner contends that he was unaware that his request for an extension to file objections had been granted, and requests that the Court amend or alter its judgment to allow for Petitioner to submit objections to Judge Binder's report and recommendation.

Motions to alter or amend judgments, filed pursuant to Rule 59(e), are "entrusted to the court's sound discretion." *Keweenaw Bay Indian Community v. United States*, 940 F. Supp. 1139, 1140 (W.D. Mich. 1996) (citing *Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982)). Rule 59(e) motions are generally granted when one of the following circumstances arises:

- (1) because of an intervening change in the controlling law; (2) because evidence not previously available has become available; or (3) necessity to correct a clear error of law or prevent manifest injustice.

Nagle Industries, Inc. v. Ford Motor Co., 175 F.R.D. 251, 254 (E.D. Mich. 1997) (citing *Keweenaw Bay*, 940 F. Supp. at 1141). Petitioner appears to be arguing that the judgment should be altered or amended to prevent a manifest injustice. However, none of the Court's orders have been "Returned as Undeliverable" mail in the case and Petitioner has not provided any explanation of why Petitioner would not have received his mail. Moreover, Petitioner still has not provided his objections to the January 15, 2012 report and recommendation. Petitioner has thus failed to show entitlement to relief

under Rule 59(e).

Accordingly, it is **ORDERED** that Petitioner's motion to alter or amend judgment (ECF No. 87) is **DENIED**.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: May 3, 2012

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means and on Damon L. Stephens #26374039, McDowell FCI, P.O. Box 1009, Welch, WV 24801 by first class U.S. mail on May 3, 2012.

s/Tracy A. Jacobs
TRACY A. JACOBS